IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

R. R. SIDEBOTHAM and J. G. G. WILMOT,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

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STATEMENT OF THE CASE

In this action an indictment was presented against the following persons: A. M. Alderson, W. C. Rae, R. R. Sidebotham, J. G. G. Wilmot, J. W. Speer, D. G. Bertoglio, H. A. Meyer, J. A. Sampson, M. A. Cort, C. A. Rainwater, C. W. Tobin, W. W. White, E. C. Wills, J. J. Ives and L. D. Clausen.

The indictment consisted of eleven counts. The first ten counts of the indictment charged the defendants with having devised a scheme or artifice to

defraud, and for the purpose of executing the scheme or artifice, or attempting so to do, having placed or caused to be placed letters, circulars, etc., in the postoffice of the United States, contrary to Section 5480 of the Revised Statutes of the United States and the amendments thereto, being Section 215 of the Penal Code of the United States.

Each of the ten counts is similar, and they differ only in the particular letter or circular alleged to have been sent through the mail.

The eleventh count charged the defendants with a conspiracy contrary to Section 5440 of the Revised Statutes of the United States, or Section 37 of the Penal Code of the United States (Rec. 1-94).

Before the cause was submitted to the jury some of the counts had been withdrawn from the consideration of the jury and some of the defendants had been dismissed on motion for directed verdict, and all of the defendants save R. R. Sidebotham and J. G. G. Wilmot were found not guilty by the jury under the counts submitted to the jury. The defendants Sidebotham and Wilmot were found guilty under the sixth count of the indictment and not guilty as to the remaining counts of the indictment submitted to the jury. (Rec. 691-695).

Only five counts of the indictment were submitted to the jury, they being the sixth, seventh, eighth, ninth and eleventh.

Before the action was brought on for trial the defendants Sidebotham and Wilmot filed a motion for change of place of trial, supported by their affi-

davit, which was by the court denied. (Rec. pp. 96-102).

At the conclusion of the evidence each of these defendants submitted a motion for a directed verdict, which motions were denied (Rec. pp. 102-104). The defendants Sidebotham and Wilmot also filed a motion requiring the government to elect whether the action would be prosecuted upon the first ten counts of the indictment or upon the eleventh count, which motion was by the court denied. (Rec. p. 731).

The evidence relied upon by the government for a conviction was in substance that the Northwestern Trustee Company, a corporation, had at several times through these defendants, as officers thereof, raised the price of its stock without the assets of the company warranting the increase in the price of the stock. Evidence was introduced for the purpose of showing that as a part of the scheme to defraud stock had been issued to these defendants and other prominent state officials of the State of Montana, and that some of the defendants and other prominent state officials of the State of Montana had merely options on stock and were not really owners and holders thereof; and that the defendants in order to make the sales of the stock of the Northwestern Trustee Company, in its advertising matter and other literature, published the fact that these state officials were stockholders in the Northwestern Trustee Company, and that as a part of the scheme to defraud the defendants mailed or caused to be mailed the circulars, pamphlets and letters referred

to in the bill of exceptions.

None of the defendants testified in their own behalf, nor was any evidence offered on the part of the defendants or any of them.

Judgment was pronounced against the defendants Sidebotham and Wilmot that they be confined in the United States penitentiary at Leavenworth, Kansas, for thirteen months and pay the costs, amounting to $4,112.00. (Rec. pp. 695-698).

Thereafter these defendants filed their petition for a new trial which was denied. (Rec. pp. 700-703).

That thereafter the plaintiffs in error filed a petition for a writ of error and a writ of error was issued. (Rec. pp. 703-705).

Accompanying the writ of error was an assignment of errors. (Rc. pp. 705-715).

Each of the defendants is now released under bonds in the sum of $3,500.00. (Rec. pp. 705-720).

Some of the questions involved relate to the aforesaid action and rulings of the court in (a) denying the motion of plaintiffs in error to require the Government to elect between the eleventh count of the indictment and the remaining counts; (b) denying the motion of plaintiffs in error for a directed verdict; (c) the giving of certain instructions to the jury, and are raised by the exceptions taken which have been settled in the bill of exceptions.

Other questions involved relate to the exceptions to the rulings of the court in admitting evidence as appear fully in the specification of errors.

There is also involved the question of the sufficiency of the evidence to sustain a conviction and the error in pronouncing judgment against plaintiffs in error by reason of the insufficiency of the evidence.

SPECIFICATION OF ERRORS.

I.

The court erred in denying the motion of these defendants requiring the United States District Attorney to make an election between the eleventh count of the indictment and the remaining counts upon the ground of duplicity. (Rec. p. 731).

II.

The court erred in denying the motion of the defendants R. R. Sidebotham and J. G. G. Wilmot for a directed verdict herein. (Rec. p. 103).

III.

The court erred in pronouncing judgment against the defendants R. R. Sidebotham and J. G. G. Wilmot. (Rec. pp. 695-698).

IV.

The court erred in overruling defendants' objection to the introduction of, and in admitting, the following evidence:—

Q. And what business did you have with him?

A. When Mr. Meyer came to my house, he came there to sell some stock in the Northwestern Trustee Company. Just Mr. DeCelle and I were present at

the time that Mr. Meyers came. I had a conversation with Mr. Meyers about the stock, you know about buying stock of him. He said it was the best company in the Northwest and so many was into it, and all the business men, and he made it so clear to us that we thought it was all right. He said the company was to sell those bonds and build houses and one thing another. It was going to be so nice and prosperous that it couldn't fail, it was just perfectly honest, there would be nothing against it. He said, we would have 8 percent on all our stock as it would rise we would have the rise of the stock and then we could have 8 percent. 8% interest on all once a year I think. He stated the first payment would be made a year from the time we signed for the stock. He said the Governor, and Senator Gibson and most all the officials of the state were connected with the company. (Rec. pp. 235-236).

V.

The court erred in overruling defendants' objection to the introduction of, and in admitting the following evidence:—

Q. Were any representations made by Mr. Sidebotham or Mr. Meyers in his presence, with reference to the organization of the company, its purposes, etc., as suggested? State what those representations were.

A. He said that he intended to form this company in the interest of building an apartment house

and various kinds of buildings in the city of Great Falls and all the money that was secured from the sale of stock would go for that purpose. I believe he told me the par value of the stock was fifteen dollars. The value of the stock was fifteen dollars. (Rec. pp. 289-290).

VI.

It was error on the part of the court to overrule defendants' objection to the introduction in evidence of the plaintiff's Exhibit 31, which reads as follows:

"Northwestern Trustee Company
Incorporated

Authorized Capital Stock $500,000.00

Sidebotham & Wilmot, Sole Fiscal Agents
General Offices, Lower Floor, Tod Building,
Great Falls, Montana, February 12, 1914.

"Mr. J. G. G. Wilmot,
Northern Hotel, Billings, Montana.

Dear Mr. Wilmot:

"After you left today I saw Mr. Armour unexpectedly, and he knows that there is something up, and he told me that he was thoroughly disgusted with the Company and said that he believed that one of the two factions had to be eliminated, either ourselves or Grogan and Dalbey. He also said he was quite positive that they would be willing to go out provided their notes

were cancelled, and the small amount paid by them was given back, and I believe it will be a very easy matter.

"Mr. McVay was down to the office and I instructed him to order Cohn or Donald Arthur over here at once and get the books in shape so that everything could be cleaned up at this next meeting. McVay seems like a nice fellow and I believe he would like to have a finger in the pie, which we will talk over when I get back Sunday.

"From what I learn from Armour they have no defense excepting that they are pretty much disgusted with the crowd and are ready to get out.

"Keep me fully advised on whatever may happen. My address will be Cutbank. I dictated this letter and it will be sent after I leave.

"With best wishes, I am

Sincerely yours,

(Signed) ROBT. R. SIDEBOTHAM."

(Rec. pp. 330-332).

VII.

It was error on the part of the court to overrule defendants' objection to the introduction in evidence of plaintiff's Exhibits 151 and 152, which read as follows:

"Northwestern Trustee Company. (Letter-head.)

(Incorporated.)

Great Falls, Montana, October 9, 1914.

"Mr. R. R. Sidebotham,

Deer Lodge, Montana.

Dear Mr. Sidebotham:

"We beg to advise you that we are this day in receipt of a subscription from C. F. Carrere, Butte, Montana, for $34,390 worth of stock. Every day shows a rapid increase in our sales.

"We wish to remind you to send in any applications you have for loans in your direct promptly.

"We are,

Very truly yours,

NORTHWESTERN TRUSTEE COMPANY,

Per. A. M. Alderson,

J. H. Pres."

Exhibit 152 Plff.

Extract.

Sworn Affidavit.

State of Montana, }
County of Cascade. } ss.

"R. H. Atkinson, being first duly sworn on oath deposes and says that he is Assistant Secretary of the Northwestern Trustee Company; that as such officer he has charge of the books and papers of the Company; that the Northwestern Trustee Company has not given away or gratuitously disposed of any stock for imaginary services for the use of names of official titles of men; that in options, contracts, notes receivable in cash, the sales have amounted to over $580,000.00.

R. H. ATKINSON.

Subscribed and sworn to before me this seventh day of February, A. D., 1914.

DUDLEY CROWTHER.

Notary public for the State of Montana, residing in Great Falls, Montana. My commission expires December 26, A. D. 1914."
(Rec. pp. 426-427).

VIII.

It was error on the part of the court to instruct the jury as follows:

What is intent? Intent is the quality of mind with which an act is done. It is the mental process, the design, the aim, the purpose or the object of the act. How is this intent arrived at? Being a mental process, you cannot penetrate to the mind of a man, if he will not tell you, unless you can infer from his conduct so that the law is, a man's intent is manifested and shown by all the circumstances connected with the offense. (Rec. p. 648).

IX.

The court erred in instructing the jury as follows:

"In September, 1914, Wiggins testified that Wilmot stopped him on the road, and sold him ten shares at Thirty dollars ($30.00) and told him the company had been paying dividends the past year at the rate of eight per cent, and he would guarantee that this year when Wiggins did buy, that it would be thirty per cent, or better. No one had denied Wiggins' testimony, and there it stands for your consideration." (Rec. p. 678).

X.

The court erred in denying defendants' petition for a new trial herein. (Rec. pp. 701-703).

ARGUMENT

I.

THE MOTION TO REQUIRE THE GOVERNMENT TO ELECT WHETHER IT WOULD SEEK A CONVICTION ON THE ELEVENTH COUNT OR THE REMAINING COUNTS OF THE INDICTMENT SHOULD HAVE BEEN SUSTAINED.

The crime set forth in the eleventh count is a separate and distinct offense from those set forth in the remaining counts of the indictment and is in no way connected with the offense set forth in the remaining counts.

The evidence required to prove the charge set forth in the eleventh count would necessarily be different than that required to prove those set out in the remaining counts.

The punishment prescribed by law for a commission of the offense set forth in the eleventh count is different than that prescribed for the other offenses.

The punishment prescribed for the commission of the offense set forth in the eleventh count is "not more than $10,000, or to imprisonment for not more than two years or to both fine and imprisonment in the discretion of the court".

The other offenses are punishable by a fine of "not more than one thousand dollars, or imprisonment not more than five years, or both."

The charge set forth in the eleventh count was that of a conspiracy and was based upon Section 37 of the Penal Code of the United States which provides as follows:

> "If two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties *do any act to effect the object* of the conspiracy all the parties to such conspiracy shall be liable to a penalty of not more than ten thousand dollars, or to imprisonment for not more than two years or to both fine and imprisonment in the discretion of the court." (Italics ours).

The other counts charged a violation of the statute forbidding the use of the mails to defraud, being Section 215 of the Penal Code of the United States.

A conspiracy is an offense entirely separate and distinct from the crimes or offenses that the parties intended to commit thereby.

In other words the conspiracy itself is a crime separate and distinct from those which form the objects of the conspiracy.

That there is a distinction between a conspiracy to commit an offense, and the offense which formed the object of the conspiracy is clearly pointed out by the court in the case of United States vs. Casey et al, 247 Fed. 362. In that case the indictment charged a conspiracy to violate Sec. 13 of the Selective Service Act of May 18, 1917, by keeping and setting

up a house of ill fame, bawdyhouse, and brothel within five miles of the military post.

Contention was made that the indictment was duplicitous.

In disposing of this question the court said:

> "The statute and the Secretary's regulation make it an offense either to set up or to keep a house of ill fame, brothel, or bawdyhouse within the prohibited zone. The contention that the indictment is duplicitous, in that the language 'keeping and setting up' charges two offences, and the use of the words 'house of ill fame, bawdyhouse, and brothel' amounts to a charge of committing three offenses, must be decided adversely to the defendants, for the reason that *a conspiracy is an offense entirely distinct from the crimes the parties intended to commit thereby.* 4 Ency. Pl. & Pr. 719; John Gund Brewing Co. v. United States, 206 Fed. 386, 124 C. C. A. 268; State v. Sterling, 34 Iowa, 443, 444; State v. Kennedy, 63 Iowa, 197, 200, 18 N. W. 885; Noyes v. State, 41 N. J. Law, 418, 420, 421, The offense charged is not that the defendants set up and kept such places, but that of conspiracy to set them up and keep them, and the commission of overt acts in furtherance of that conspiracy. The fallacy in the defendants' position is that it confounds the crime, which is the conspiracy, with the objects of the conspiracy. A combination to commit several crimes is a single offense, and the offense can always be laid according to the truth. If, therefore, it is a fact that the defendants conspired

> to violate the law in question in two or more distinct particulars with respect to such combination, the criminal act was single, and such it appears to be on the face of the indictment". (Italics ours).

On the same question the Supreme Court of Iowa in the case of State vs. Kennedy Sr., 18 N. W. 885, said:

> "The crime of conspiracy consists in the unlawful and corrupt agreement of the parties. *It is entirely distinct from the crimes or unlawful acts which the parties have in view when they enter into the conspiracy, or the object which they intend to accomplish in pursuance of it.* The crime is complete whenever the agreement is entered into, and it is not essential to it that any overt act be committed in pursuance of it." (Italics ours).

Section 1024 of the Revised Statutes of the U. S. provides for the joinder of counts in an indictment, as follows:

> "When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court may order them to be consolidated."

It has been held repeatedly that a motion requiring the government to elect between counts charging separate crimes should be sustained.

In the case of U. S. v. Gaston, 28 Fed. 848, the defendant, as shown by the opinion of the court, was accused by indictment of the following offenses:

> "(1) That the defendant carried on the business of retailing liquor without posting in his place the stamp denoting the payment of the special tax required by law; (2) that he carried on the said business without having paid the special tax required by law; (3) that he carried on the business of dealing in manufactured tobacco without posting in the place the stamp denoting the payment of the special tax required by law; (4) that he carried on the said business without having paid the special tax required by law."

And the court in holding that the counts were improperly joined, said:

> "This indictment contains, in separate counts, two distinct offenses, the penalty in each offense being different from the other. As a retail liquor dealer he *must* be imprisoned as a part of the penalty, and as a dealer in manufactured tobacco he *may* be imprisoned, and the minimum fine is different. These offenses are, besides, separate and distinct transactions, and not of the same class of crimes or offenses that may be joined under section 1024 of the Revised Statutes."

The Supreme Court of the U. S. in the case of

Pointer v. U. S., 38 Law. Ed. 208, in stating the facts which presented this question, said:

> "Before the case was opened to the jury for the government the defendant moved that the district attorney be required to elect on which count of the indictment he would claim a conviction. That motion having been overruled, he was required to go to trial upon all the counts.
>
> "Upon the conclusion of the evidence the defendant renewed the motion that the government be required to elect upon which count of the indictment it would prosecute him. This motion was overruled. After an elaborate charge by the court, the jury retired to consider their verdict, and returned into the court the following: 'We, the jury, find the defendant John Pointer guilty of murder as charged in the first count of the indictment. F. M. Barrick, Foreman. We, the jury, find the defendant John Pointer guilty of murder as charged in the third count of the indictment. F. M. Barrick, Foreman.'" . . . . . .
>
> 1. The motion to quash the indictment and the motion to require the government to elect upon which count it would try the defendant, present the question whether two distinct charges of murder can properly be embraced in one indictment."

In holding that the indictment was bad for duplicity, the court said:

> "It is appropriate to say that we lay no stress upon the circumstance that the motions in question were not made until after the defendant

> had pleaded not guilty. We have already said that, if in the progress of the trial it appeared that the accused might be embarrassed or confounded in his defense, by reason of being compelled to meet both charges of murder at the same time, and before the same jury, it was in the power of the court, at any time before the trial was concluded, to require the government to elect upon which charge it would seek a verdict."

Section 9151 of the Penal Code of the State of Montana is declaratory of the law in the State of Montana as regards the right to join more than one offense in the same indictment or information. It provides as follows:

> "The indictment or information must charge but one offense, but the same offense may be set forth in different forms under different counts, and when the offense may be committed by the use of different means, the means may be alleged in the alternative in the same counts."

That a motion to elect is the proper method of raising this question there can be no doubt.

Betts vs. State (Texas), 133 S. W. 251;

State vs. Carragin (Mo.), 16 L. R. A. (N. S.) 561;

Kimbrell vs. State (Okl.), 123 Pac. 1027;

Sturgis vs. State (Okl.), 102 Pac. 57;

State vs. Lockwood, 3 Atl. 539.

It cannot be contended that no prejudice resulted to the defendants by reason of the ruling of the court in refusing to compel an election.

Much evidence was allowed to be introduced under the theory that it was admissible under the eleventh count which charged a conspiracy which was damaging to these defendants, and which otherwise could not have been admissible in proving the charge under the remaining counts. This is evident from the statements made by the court during the trial relative to the admission of acts and statements of one alleged co-conspirator. The court said:

> "It is a conspiracy charge if they prove it. The acts and statements of one conspirator are competent evidence against his fellows. You may proceed."—(Rec. p. 235).

Furthermore, it is entirely possible that had the government been compelled to make an election it might have elected to stand upon the eleventh count and as to this the jury brought in a verdict of acquittal. No one can say just what evidence might have led the jury to believe that the defendants were guilty of the offense set out in the sixth count. It might have been the evidence allowed to be introduced under the charge of a conspiracy, which in fact did not exist.

The language of the Supreme Court of the United States in the case of McElroy v. U. S., 41 Law. Ed. 355, is here pertinent. It said:

> "It cannot be said in such case that all the

> defendants may not have been embarrassed and prejudiced in their defense, or that the attention of the jury may not have been distracted to their injury in passing upon distinct and independent transactions. The order of consolidation was not authorized by statute and did not rest in mere discretion."

It was error to deny the motion to require the Government to make an election between the eleventh count of the indictment and the remaining counts and a new trial of said action should be granted.

II.

THE EVIDENCE IS INSUFFICIENT TO SUPPORT A CONVICTION UNDER THE SIXTH COUNT AND THEREFORE THE MOTIONS FOR DIRECTED VERDICT SHOULD HAVE BEEN SUSTAINED.

The circular referred to in the sixth count shows on its face that it was signed by J. Hosking. (Rec. pp. 48-49). The evidence does not show that Sidebotham or Wilmot actually deposited in the mails the circular referred to in the sixth count or that the same was deposited by their agent under their directions with their knowledge. That such a showing is necessary to support a conviction is a fundamental proposition of law.

In the case of United States vs. Flemming, et al, 18 Fed. 907, the rule is stated as follows:

> "It is also not necessary to show, in order to make out this offense, that the defendants actually, with their own hands, placed a letter or packet in a post-office. If it appears from the proof that it was done through their agency or direction, by an employe or agent of the defendants, employed and directed for that purpose, it is enough."

The same rule was declared in the case of Rumble vs. United States, 143 Fed. 772, 779 where the court said:

> "In addition to the points already discussed, special objection is made to exhibit 17, which is a printed circular prepared by Smith and Bull, who were induced to become agents for the sale of stock that the plaintiff was endeavoring to sell. It was prepared, signed, and distributed by Smith & Bull through the mails, and it is claimed that this circular was wholly irrelevant and inadmissible, and that the plaintiff in error could not be bound by any matter therein contained.
>
> *"It may be admitted, for the purpose of this opinion, that, if the circular had been issued and circulated without the knowledge and consent of the plaintiff in error, he would not be bound thereby."* (Italics ours).

In the case of Commonwealth v. Eastman, 1 Cush. (Mass.) 189, 48 Am. Dec. 596, the court in discussing the question whether or not certain letters not written by the party were admissible, said:

> "So far as these letters might have been shown by other proof to have been acted upon or sanctioned by the defendants, so far they would have been competent evidence."

When the circular set out in the sixth count was admitted in evidence the record discloses that the following proceedings took place in an effort to connect the sending of the same with these defendants. The witness Hosking testified as follows:

> "These two were sent out together. Sidebotham and Wilmot actually sent them out, mailed them. I did for them. It was my instructions to send them out for them. Exhibits 97, 98 and 99, were sent through the mail. And as far as I can tell you, as far as I can remember they were dropped into the United States post office." (Rec. p. 333).

This evidence is insufficient to show that these defendants instructed the witness Hosking to send out the circular. She may have received the instructions from any other of the defendants. The evidence does not show which one of these defendants, if either of them, instructed the witness to send the circular in the mails.

The evidence being insufficient to sustain a conviction it was also error to pronounce judgment against plaintiffs in error.

III.

THE DECLARATIONS OF AN ALLEGED CONSPIRATOR MADE IN THE ABSENCE OF ONE DEFENDANT ARE NOT ADMISSIBLE AGAINST SUCH DEFENDANT UNTIL AFTER A CONSPIRACY IS PROVED:

During the examination of the witness Alice M. Decelles it was shown that she had business transactions with a Mr. Henry A. Meyers. The following question was propounded to the witness:

Q. And what business did you have with him?

To this question the following objection was interposed by Judge Smith:

"That is objected to as incompetent, irrelevant and immaterial. Mr. Meyers' name has been entered in this indictment as a defendant, but has not been apprehended. I don't understand that the government can put the name of John Doe in an indictment and prove what he said."

This objection was overruled by the court, and the court made the following statement:

"It is a conspiracy charge if they prove it. The acts and statements of one conspirator are competent evidence against his fellows. You may proceed. Objection overruled."

Exception noted. (Rec. p. 235).

Throughout the trial many like objections were interposed to the admission in evidence of statements and declarations made by alleged co-conspirators not in the presence or with the knowledge of these

plaintiffs in error, and the objections to the same were overruled by the court for the same reasons as assigned to the above question. No rule of proof respecting a party's connection with a conspiracy is better settled than the following:

> "No man's connection with the conspiracy can be legally established by what the others did in his absence and without his knowledge and concurrence."

Winchester etc. Co. v. Creary, 116 U. S. 161;

Rea v. Missouri, 17 Wall. 532;

U. S. v. Babcock, 3 Dill. (U. S.) 581; 24 Fed. Cas. No. 14, 487;

U. S. v. Goldberg, 3 Biss. 175; 25 Fed. Cas. No. 14, 487;

U. S. v. McKee, 3 Dill. 546; 26 Fed. Cas. No. 15, 685;

U. S. v. Newton, 52 Fed. 275;

Barkley v. Copeland, (Cal.) 25 Pac. 405.

It is also a well-established rule of law that the statements and declarations made by an alleged co-conspirator are not admissible against the other defendants until there has been prima facie proof of the existence of a conspiracy, and neither is it permissible that such statements and declarations in themselves can be used to prove the conspiracy. Sec. 7887 of the Revised Codes of the State of Mon-

tana provides in part as follows:

> "In conformity with the preceding provisions, evidence may be given upon a trial of the following facts:
> "*After proof of a conspiracy,* the act or declaration of a conspirator against his coconspirator, and relating to the conspiracy." (Italics ours).

This statute though perhaps not controlling upon this Court, is entitled to some consideration as indicating the policy of the State of Montana with reference to this question.

In the case of People v. Irwin, 20 Pac. 56, 58, the court in speaking of this question, said;

> "But it is claimed by counsel for respondent that these declarations were admissible in evidence to prove conspiracy, and the court seems to have allowed them for that and no other purpose; that is to say, the main fact which they are supposed to explain is the alleged conspiracy, and not the killing. In other words, it is admitted by counsel for respondent—as we understand the matter—that, if there was no question of conspiracy in the case, a declaration by deceased that Irwin was making preparations to kill him, and would kill him unless he left the country, would be inadmissible. This must be admitted. Such a declaration is on a par with the one referred to in People v. Carlton, supra, and, as said there, 'not admissible upon any theory or principle of the law with which we are acquainted.' The existence of a

conspiracy was a fact to be proven in the case. Without such proof the defendant could not be convicted, as it is not claimed that he was present at the killing, or knew of it until some hours after it occurred.

"Now, the declaration of Prewett, Fowles, or of any other alleged conspirator, could not be admitted to prove the fact of conspiracy. Such declaration would be rejected, 'lest,' as Greenleaf says: 'the jury should be misled to infer the fact itself of a conspiracy from the declaration of strangers.' I Greenl. Ev. Sec. 111. *'After proof of conspiracy, the act or declaration of a conspirator against his co-conspirator, and relating to the conspiracy,' is the restriction which is placed upon the evidence of co-conspirators by our Code of Civil Procedure, (section (1870), lest the jury take the declaration of one, not proven by other evidence to be a conspirater, as proof of the conspiracy itself, and then, 'after proof of conspiracy by such declarations, use the same evidence to establish the guilt of the defendant.* We are unable to discern any greater sanctity in the declarations of a deceased in this regard than that pertaining to the declarations of alleged conspirators. Declarations favorable to defendant, made by the deceased so long prior to the killing, have been held to be not admissible as a part of the res gestae." (Italics ours.)

In the case of People v. Parker, 34 N. W. 720, 723, the court in speaking of this question, said:

"A very important question arising in this case relates to the admission of the statements

of Van Alstine, made at various times in reference to this deed and the ownership of the land, not in the presence or hearing of the respondent Parker, and without his knowledge or consent. The theory of the prosecution was that Van Alstine, Cleveland, and Parker conspired together to commit the crime, and that the acts and declarations of each in the pursuance of the common purpose was evidence against all, whether in their presence or not. This is true where the acts and declarations sought to be given in evidence are confined to the time intervening between the beginning and ending of the conspiracy. What was said or done by one of the conspirators before the conspiracy was formed, or after its object had been obtained, or its work fully completed, not in the presence or hearing of the others, and not brought to their knowledge and ratified by them, is not admissible against them or either of them. And before such acts and declarations can be admitted, in any event, a prima facie case of conspiracy must appear to the trial court, and then the declarations and acts during the performance of the conspiracy can be submitted to the jury, to be used by them if they find such conspiracy existed, but to be discarded in case it is not established. *Such acts and declarations cannot be used to show the conspiracy without other independent evidence.* The first statement made by Van Alstine in reference to this land after the death of his wife, as proven by the people, was to one Thomas J. Lowery, at a religious meeting, held near Kelly's Corners. The substance was that he

had given Eleanor some hundreds of dollars towards the payment for this land; that he would have had her deed it to him had he supposed she was going to die, but as it was, he had not 'the scratch of a pen to show for it'. He asked Lowery what he could do about it, and Lowery advised him to place his claim before the commissioners. Respondent then said: 'Tom, can you make out a deed, and date it back?' Lowery answered: 'No, sir: I cannot.' There is no pretence that the respondent ever knew of this conversation, *and there is not the slightest warrant anywhere in the testimony that at this time any conspiracy had been formed or thought of between Parker and Van Alstine.* On the contrary, the fact of Van Alstine asking Lowery to make a false deed rebuts any idea that he and Parker had agreed together to forge the deed in question. The evidence had a direct tendency to show that at the time of the talk with Lowery no deed from Eleanor to Van Alstine was in existence, and therefore that the deed acknowleged by Parker was a forgery. It was properly used against Van Alstine upon the trial, but as against Parker it was inadmissible; being the declaration of Van Alstine without the presence or sanction of Parker, and before they had joined in a conspiracy to forge and defraud as alleged in the information.

"Equally inadmissible was the testimony of Hiller to a conversation had with Van Alstine to the same purport. In May, 1877, Hiller testified that Parker had a conversation with him nearly of the same nature as that of Van Alstine, which occurred in December, 1876, or

January, 1877. It is argued that the similarity of these two talks is evidence of a then existing conspiracy between Van Alstine and Parker to forge a deed of this land. What Parker said was clearly admissible against him, and might be evidence of a conspiracy formed at that time, but it had no tendency to establish the conspiracy existing at the time of Van Alstine's talk with Hiller.

"Evidence was also introduced as to what was done and said in the presence of Van Alstine at the time of the appraisal of the property of the deceased, Eleanor Pelton; and that, when the appraisers spoke of inventorying this land as the property of Eleanor, Van Alstine made no objection. It is not shown that Parker was in anyway connected with this appraisal, or knew anything about it. The appraisal took place in the fall of 1876. It is evident that no conspiracy existed at that time. The evidence was improperly received." (Italics ours).

In the case of State v. Brady, 12 S. E. 325, 327, the court in speaking of this question, said:

"The acts and declarations of the defendants are evidence for the jury to consider in determining whether, in fact, the defendants did form the conspiracy with which they are charged; *and here I may repeat to you that the acts and declarations of any one of the defendants, although evidence against the party making them are not evidence against any of the others, unless you find there was a common purpose.* Then the acts and declarations of each one of the

parties who had the common purpose are competent evidence for the jury to consider as against each one of the defendants who had such common purpose to unlawfully cheat and defraud W. K. Jackson." (Italics ours).

In the case of State v. Mace, 24 S. E. 798, 800, the court recognized the rule that proof of the conspiracy should first be made before such evidence becomes admissible. In this case, however, the court was satisfied that such a conspiracy did exist and that proof of that fact had been made. However, the court recognized that this was an essential requirement before the evidence could properly be admitted. In the course of its opinion the court said:

"The other exceptions were to the testimony going to show threats against the deceased, made before the homicide by the defendants, at different times, and not in the presence of each other. *This testimony was not offered until the fullest proof had been received going to show that the defendants, on the night of the killing, had concerted and conspired to take the life of the deceased.* The testimony went to prove that they sought opportunity to kill him from the time they saw him; that they called him aside from the crowd after having talked to themselves a while, saying, 'We have a little settlement to make with you;' that one or two of the witnesses followed whereupon the defendants told them to stay away; that presently they went off towards Ingle's, after the liquor, and,

returning, found the deceased sitting on a bank, on the side of the road; that Newton said, 'Come up here, Zeb,' whereupon Zeb and some of the witnesses started, when Newton said, 'No, we don't want anybody but Zeb.' Jeff had the pistol in his hand, the other two defendants saying to the witness, 'Don't bother Jeff; let Jeff alone'. Jeff had his way, and shot and killed the deceased. These defendants are brothers, and Flasher's threats were because of a difficulty between Jeff and the deceased. Under all the circumstances, we are of opinion that the testimony was competent to show that the conspiracy was made and entered into by the defendants before the night on which it was carried out." (Italics ours).

The same rule was declared in the case of People v. Nall, 89 N. E. 1012, 1016, where the court said:

"Evidence tending to show the relation of the parties, the purpose of the combination, and the preliminary steps taken to effect that purpose is within the scope of the investigation to establish the conspiracy. *The conspiracy once being shown, acts and conversations of one of the conspirators are admissible against all.*" (Italics ours).

The eleventh count of the indictment was based upon a conspiracy formed by the defendants to use the mails to defraud. Inasmuch as the jury found the defendants not guilty under this eleventh count this proves conclusively that there did not exist a conspiracy among the defendants, and we submit

that the evidence failed to make out a prima facie case of conspiracy. That a prima facie case of conspiracy had not been established at the time of the introduction of such evidence and that the court realized this fact is shown by the statement of the court as follows, "It is a conspiracy charge if they prove it." This being true the evidence which was admitted was obviously not properly admissible because when offered there was no proof of a conspiracy on the part of the defendants. The evidence was prejudicial, for the jury undoubtedly would consider this evidence in determining whether in fact there existed a scheme to defraud, though it was not properly admissible on that issue.

IV.

EVIDENCE IMPROPERLY ADMITTED.

Exhibit 151 and 152 were introduced in evidence over the objection of the defendants. The objection was based upon the ground that the introduction of the exhibits would violate the constitutional rights of the defendants because they would be forced to give evidence against themselves and also violate the constitutional right to be immune from unreasonable searches and seizures. (Rec. p. 426).

Exhibit 151 reads as follows:

"Mr. R. R. Sidebotham,
Deer Lodge, Montana.
Dear Mr. Sidebotham:
"We beg to advise you that we are this day in

receipt of a subscription from C. F. Carrere, Butte, Montana, for $34,390 worth of stock. Every day shows a rapid increase in our sales.

"We wish to remind you to send in any applications you have for loans in your direct promptly.

We are,

Very truly yours,
NORTHWESTERN TRUSTEE COMPANY,
Per A. M. ALDERSON,
JH. Pres."

Exhibit 152 reads as follows:

"State of Montana, }
County of Cascade. } ss.

"R. H. Atkinson, being first duly sworn on oath, deposes and says that he is Assistant Secretary of the Northwestern Trustee Company; that as such officer he has charge of the books and papers of the company; that the Northwestern Trustee Company has not given away or gratuitously disposed of any stock for imaginary services for the use of names of official titles of men; that in options, contracts, notes receivable in cash, the sales have amounted to over $580,000.00.

R. H. ATKINSON.

Subscribed and sworn to before me this seventh day of February, A. D. 1914.

DUDLEY CROWTHER,
Notary Public for the State of Montana, residing in Great Falls, Montana. My commission expires December 26, A. D. 1914."

The same is true of exhibit 31 which was admitted in evidence over the objection of the defendants. (Rec. pp. 217-218-330-331).

It reads as follows:

"Mr. J. G. G. Wilmot,

Northern Hotel, Billings, Montana.

"Dear Mr. Wilmot:

"After you left to-day I saw Mr. Armour unexpectedly, and he knows that there is something up, and he told me that he was thoroughly disgusted with the Company and said that he believed that one of the two factions had to be eliminated, either ourselves or Grogan and Dalbey. He also said he was quite positive that they would be willing to go out provided their notes were cancelled and the small amount paid by them was given back, and I believe it will be a very easy matter.

"Mr. McVay was down to the office and I instructed him to order Cohn or Donald Arthur over there at once and get the books in shape so that everything could be cleaned up at this next meeting. McVay seems like a nice fellow, and I believe he would like to have a finger in the pie, which we will talk over when I get back Sunday.

"From what I learn from Armour they have no defense excepting that they are pretty much disgusted with the crowd and are ready to get out.

"Keep me fully advised on whatever may happen. My address will be Cutbank. I dictated this letter and it will be sent after I leave.

"With best wishes, I am,
Sincerely yours,
(Signed) ROBT. R. SIDEBOTHAM."
(Rec. pp. 330-331).

A similar proposition was presented to the court in the case of Packer v. United States, 106 Fed. 906, where the court said:

> "It is also urged that the letter was admissible as a tacit admission by the accused of the truth of its statements; it having been proved that the accused did not reply to it. Admissions, of course, may be inferred from silence as well as from express statements, but it has been uniformly held by the courts that the failure to reply to a letter is not to be treated in a criminal or in a civil action as an admission of the contents of the letter."

The same proposition was also before the court in the case of Bumble v. United States, 143 Fed. 772, where the court in speaking of the admissibility of a certain letter written by one of the defendants, said:

> "The plaintiff in error claims that the court erred in admitting in evidence the following letter:
>
> "Oct. 29, 2 G. W. Rumble, Chronicle Bldg.—Dear Sir: Replying to yours of the 10th would say, we now have an opportunity to sell the 'Amo' mine for $1,500.00. If you want it at that price you can have it. * * *
>
> 'Very respectfully,
> GEO. H. FULLER.'

"The objection urged to this letter, in addition to others previously disposed of, is that it is not a letter written by the defendant, and is therefore wholly irrelevant and immaterial to the subject-matter under consideration. It will be conceded that a letter written to the defendant which was not answered by him, would not be admissible in evidence as tending to show an implied admission on his part of the truth of the statements contained in the letter."

V.

ERRONEOUS INSTRUCTIONS OF THE COURT.

The court erred in referring in its instruction to the fact that the defendants did not take the stand and testify in their own behalf.

The Court in instructing the jury undertook to define the meaning of the word "intent", and in the course of the charge stated:

"What is intent? Intent is the quality of mind with which an act is done. It is the mental process, the design, the aim, the purpose or object of the act. How is this intent arrived at? Being a mental process, you cannot penetrate to the mind of a man, *if he will not tell you,* unless you can infer from his conduct so that the law is, a man's intent is manifested and shown by all the circumstances connected with the offence." (Rec. p. 648).

This statement calls the attention of the jury to the fact that the defendants did not testify in their

own behalf and, coming from the court, unduly impresses it upon the minds of the jurors to the prejudice of defendants.

Again, the court instructed the jury as follows:

> "In September, 1914, Wiggins testified that Wilmot stopped him on the road, and sold him ten shares at Thirty Dollars ($30.00), and told him the company had been paying dividends the past year at the rate of eight per cent, and he would guarantee that this year when Wiggins did buy, that it would be thirty percent, or better. *No one had denied Wiggins'* testimony, and there it stands for your consideration." (Rec. p. 678).

This also directs the jurors' attention to the fact that the defendant Wilmot did not take the stand. No showing was made that anyone else heard the statements referred to and therefore Wilmot was the only witness who could have denied the statements referred to, and the instruction comments on his failure to do so.

Section 9484 of the Penal Code of the State of Montana provides in part as follows:

> "If the defendant does not claim the right to be sworn, or does not testify, it must not be used to his prejudice, and the attorney prosecuting must not comment to the court or jury on the same."

Any indirect reference to the defendants' refusal to testify is error. In the case of Watt vs. People

of Illinois, 1 L. R. A. 403, 409, the court said:

> "It is no doubt the duty of the circuit court in all criminal trials, when the defendant does not testify in his own behalf, to see to it that the mandate of the statute is strictly enforced. *Indirect and covert references to the neglect of the defendant to go upon the witness stand may be as prejudicial to his rights as a direct comment upon such neglect.*" (Italics ours).

The rule is stated in Volume 1, Wharton's Criminal Evidence, Section 435a, as follows:

> "But only that comment evades the law which by direct or indirect reference tends to direct the attention of the jury to the fact that the accused is silent."

And there is no question but that the law is well-settled that a defendant is justified in not taking the stand in his own behalf, and if this is so, that fact is not to be used in any way against him.

The statement made by Chief Justice Fuller in the case of Starr vs. United States, 38 L. Ed. 841, 846 is here pertinent. He said:

> "It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference, and may prove controlling."

In the case of State v. Jones, 147 N. W. 822, 126 Minn. 45, it was held error for the court to call the

jury's attention to the fact that the defendant *was not present* during the trial.

In Miller v. People, 216 Ill. 309, 74 N. E. 743, the lower court in sustaining an objection to certain evidence, in referring to the defendant, used the following words:

> "He is here, and he can answer for himself in regard to it."

The Supreme Court of Illinois in holding this statement objectionable uses the following language:

> "When announcing the ruling denying to the plaintiff in error the right to have such questions and answers detailed by the witness (the court reporter), the court, after stating that the plaintiff in error had a right only to cross-examine as to the correctness of the testimony of the reporter as to the questions and answers called for by the prosecution, said (speaking of plaintiff in error), 'He is here, and he can answer for himself in regard to it.' This remark was objectionable. It, in effect, said to the jury that the plaintiff in error had the legal right to appear as a witness in that present hearing, and could then explain, qualify, or correct, as he might desire, any statement brought out by the testimony of the reporter. The statute which authorizes any one accused of crime to testify in his own behalf confers a right or personal privilege to speak or remain silent. This statute (Cr. Code, div. 13, P. 6), expressly provides that his election not to testify shall not create any presumption against him,

and that the court shall not permit any reference or comment to be made on the failure to testify. *This remark of the court would necessarily create a presumption against the plaintiff in error in the event he should elect not to appear as a witness in the cause on trial, and, as the court remarked, "answer for himself in regard to it."* No objection was made or exception preserved to this remark. In Angelo v. People, 96 Ill. 209, 36 Am. Rep. 132, and in Quinn v. People, 123 Ill. 333, 15 N. E. 46, counsel for the prosecution, in argument to the jury, referred to the fact that the defendant had not seen fit to testify and explain or answer certain things claimed to have been proved against him. In each of the cases, objection was made; in the Angelo Case the court stopped counsel, and directed the jury to disregard that part of his argument; and in the Quinn Case the court stopped counsel, and then explained to the jury that the remarks were improper. In each of those cases we held that the reference made by counsel to the right of the defendant to give testimony in his own behalf interfered with a fair and impartial trial, to which the defendant was entitled under the law; and, notwithstanding the action of the court in restraining counsel and directing the jury to disregard what had been said, the violation of the statute was deemed prejudical to the right of the defendant to a fair trial, and fatally erroneous. *In the case at bar the remark was that of the court, and not of counsel; but it was in a greater degree prejudicial to the right of the plaintiff in error to a fair and impartial trial*

under the law, for the reason that, coming from the court, it would have greater weight with the jury. In view of the state of the proof in the record, if objection had been preserved to this remark, we should have felt it our duty to reverse the judgment because of it." (Italics ours).

For the reasons herein set forth the judgment of the District Court should be reversed.

Respectfully submitted,

WELLINGTON D. RANKIN,

Attorney for plaintiffs in error.